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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. ROSS ALLEN WARDLAW, Defendant and Appellant.	C040187 (Super. Ct. No. 01F01829)

A jury found that Ross Allen Wardlaw committed three or more acts of substantial sexual conduct with three of his wife's nieces when they were between the ages of five and 12. (Pen. Code, § 288.5, subd. (a).)[1] Although their Aunt H., who figured prominently in both the prosecution and defense cases, witnessed some of the acts, she did nothing. The court sentenced defendant to 36 years in state prison. On appeal, he asserts a statute of limitations defense, insufficiency of the evidence, instructional and sentencing error, and ineffective assistance

[1] All further statutory references are to the Penal Code unless otherwise indicated.

of counsel. As we explain herein, we accept the Attorney General's recommendation to adjust the custody credits; we strike the parole revocation fine; and we remand the case to the trial court to determine how many custody credits to which the defendant is entitled, if any, for custody served in Idaho. In all other respects, we affirm.

FACTS

Defendant married H. in 1984. By 1989 they had four boys. Never achieving financial independence, they lived with his parents (the Wardlaws) or hers for the first two years of their marriage, taking advantage of the nice swimming pool on the Wardlaws' property. They moved to her parents' dairy farm in about 1986, where many of H.'s siblings and their children also lived. According to defendant and several defense witnesses, the children roamed the farm in "herds" or "packs." Defendant and H.'s relationship remained volatile throughout their 14-year marriage; they both drank; he had affairs; and she shouted at him, hit him, and repeated how much she hated him. They lied to collect welfare.

While at the dairy, they lived in a trailer. Defendant removed the walls to expand the trailer but apparently did not complete the project. No one, according to defendant's mother, slept in a bedroom. Instead, the dog occupied one bedroom, defendant's musical equipment another, and the third was full of clothes and "stuff." Defendant, H., and the boys all slept in the living room together. He slept in a recliner with one of his boys. Defendant and his family later moved back to the

Wardlaws' house in Wilton, and in 1993, they followed the Wardlaws to Idaho where, again, they lived in their house.

H. had many nieces who either lived on the farm or visited frequently. Four of them (M., S., D., and E.) testified that defendant sexually abused them for many years. M., the youngest, revealed the history of abuse to her counselor during a drug rehabilitation program. Her revelations triggered an investigation of the extended family. Defendant insists the girls, conspiring with their Aunt H., concocted the allegations during a bitter custody dispute. The jury rejected the conspiracy defense, accepting the compelling testimony offered by the four young women.

According to M. and her sister S., the abuse began when they were only five years old. S., who was 21 and pregnant at the time of trial, recounted seven years of degradation. Defendant began touching her vaginal area and her buttocks with his hands and penis when she was five. She specifically remembered defendant's kissing her with his tongue when she was in kindergarten.

S. testified to an unremitting pattern of abuse from age nine until she was 12. She described two incidents in specific detail. She remembered slamming her thumb in a car door. The following day, defendant raped her. Her grandmother took her to the hospital the same day. During an examination, the staff found two drops of blood on her panties, but her medical records revealed no trauma to her genitalia. She also remembered another specific incident when she was watching the Rodney King

riots on television and defendant touched her inside her vagina. On this occasion, Aunt H. walked into the room and asked defendant what he was doing. S. was 11 years old.

S., like the other victims, testified to repeated molestations in the Wardlaws' swimming pool. According to S. and D., defendant would touch the inside of their vaginas after catching them coming down the slide. The last incident S. reported occurred when she was 12. She slept on a bottom bunk on her stomach when defendant, with an erect penis, rubbed the skin of her buttocks.

D., also 21 at the time of trial, testified to a similar pattern. Defendant began molesting her when she was nine. Because her parents worked graveyard shifts, D. stayed at the dairy. She recounted many incidents of digital penetration and oral copulation occurring between 1989 and 1992. On one occasion when defendant forced her into the bathroom, Aunt H. walked in and shouted "Ross, what the hell?"; defendant ran out of the room. D. specifically remembered that the night before her confirmation, when she was 11, defendant stuck his finger in her vagina and licked her while she pretended to sleep. She, too, described the numerous molestations in the pool.

At the time of trial, M., then 16 and very troubled, presented the most pathetic portrait. Whether because of sexual abuse, drug abuse, or the fact she had been abandoned by her mother, she provided fewer details than her sister and cousins. She began using methamphetamine when she was 10 and participated in drug rehabilitation therapy when she was 15. It was M. who

revealed to her therapist that defendant had molested her since she was five. That revelation triggered the ensuing investigation that ultimately led to the charges against defendant.

M. told the investigating officer that defendant molested her almost every day in the summer when she was seven. The abuse had begun when he walked her to the school bus when she was five, grabbed her breasts, and touched her mouth and her breasts with his tongue. She also told the officer the molestations continued until defendant moved to Idaho, which was in June or July of 1993. She, too, believed Aunt H. knew what was going on because Aunt H. referred to defendant as a "dirty bastard." Defendant again molested her during a week she spent visiting the family in Idaho in 1995.

E. testified pursuant to Evidence Code section 1108 that at the age of eight or nine, defendant would grab her buttocks and that between the ages of nine and 11, she would go swimming with the other girls and he would grab her between the legs.

Defendant testified he did not molest, rape, or orally copulate any of the girls. His daughter from a previous marriage testified she had never observed defendant behave inappropriately around children. Defendant believed the allegations were instigated by H. who, according to defendant, was a mean, jealous, and vindictive woman following through on her threat defendant would serve time in prison.

DISCUSSION

I

STATUTE OF LIMITATIONS

Section 803, subdivision (g) (section 803(g)) allows the prosecution to file an information after the expiration of the statute of limitations provided in sections 800 (six years) and 801 (three years). (*People v. Frazer* (1999) 21 Cal.4th 737, 751.) Section 803(g) states in pertinent part: "(1) *Notwithstanding any other limitation of time described in this chapter*, a criminal complaint may be filed within one year of the date of a report to a California law enforcement agency by a person of any age alleging that he or she, while under the age of 18 years, was the victim of a crime described in Section . . . 288.5 . . . . [¶] (2) This subdivision applies only if both of the following occur: [¶] (A) The limitation period specified in Section 800 or 801 has expired. [¶] (B) The crime involved substantial sexual conduct . . . ." (Italics added.) Section 803, subdivision (d) (section 803(d)) states: "If the defendant is out of the state when or after the offense is committed, the prosecution may be commenced . . . within the limitations of time prescribed by this chapter, and no time up to a maximum of three years during which the defendant is not within the state shall be a part of those limitations."

M., D., and S reported defendant's criminal conduct in 2001, which was more than six years after commission of the offenses. The prosecution filed its information well within the

one-year limitation established in section 803(g). It would appear, therefore, that section 803(g) would apply. Defendant argues, however, that section 803(d) tolls the limitations periods contained in sections 800 and 801. Consequently, a necessary element of section 803(g) is missing: "The limitation period specified in Section 800 or 801" had not expired.

Section 803(g) begins with the dispositive language, "*Notwithstanding any other limitation of time described in this chapter* . . . ." (Italics added.) With this language, the Legislature made section 803(g) independent of the many other limitations of time contained in the same chapter. (*Stogner v. Superior Court* (2001) 93 Cal.App.4th 1229, 1236.) Both sections 803(g) and 803(d) were intended to extend the time in which crimes could be prosecuted. We cannot accept defendant's strained interpretation of the statute to defeat the clear legislative directive. (*People v. Zandrino* (2002) 100 Cal.App.4th 74, 80.) On its face, section 803(g) clearly applies. Its admonition "[n]otwithstanding any other limitation of time described in this chapter" precludes us from importing the out of state tolling provision described in section 803(d) to defeat the relaxed time limitation accorded in section 803(g).

II

SUFFICIENCY OF THE EVIDENCE

In a strained attempt to parse the evidence, defendant contends the prosecution failed to introduce substantial evidence that he engaged in continuous sexual abuse of M. beyond

a three-month period. He misunderstands the limited scope of appellate review and ignores the inferences we must draw from an examination of the entire record.

Viewing the evidence in the light most favorable to the prosecution, we must determine whether "'*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" (*People v. Staten* (2000) 24 Cal.4th 434, 460.) "'The trier of fact, not the appellate court, must be convinced of the defendant's guilt, and if the circumstances and reasonable inferences justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant reversal of the judgment.'" (*In re Randy S.* (1999) 76 Cal.App.4th 400, 404.)

M. testified that while she was seven years old and before he moved to Idaho, defendant touched her vagina and her buttocks with his penis a lot more than two times and with his fingers more than five times. She told Detective Pittack that the summer when she was seven years old, defendant had touched her almost every day. She also told Detective Pittack that defendant had tried to force her to orally copulate him five or six times, he had licked her breasts more than 30 times, and he had touched her chest more than 300 times.

Defendant seems to concede there is evidence that his sexual abuse of M. continued for more than three months but insists there is insufficient evidence that "substantial" sexual conduct occurred over the requisite time frame. The jury was

instructed that "substantial sexual conduct" required "penetration, however slight, of the vagina or rectum of the victim by the penis or finger of the defendant, oral copulation or mutual masturbation. The term 'mutual masturbation' includes the defendant touching the genitals of the victim, however slight." Defendant acknowledges that M. testified to multiple touchings that would constitute substantial sexual conduct, but hypothesizes that those may have all occurred on one occasion. Drawing all inferences in support of the verdict as we must, we conclude the jury rejected this farfetched hypothesis with ample justification.

M. lived with her father at her grandparents' dairy when she was seven years old. As only one of the many unsupervised youngsters at the dairy, she roamed freely when her father was at work. As a consequence, defendant, who also lived at the dairy and only worked occasionally, had easy and consistent access to M. She remembered he touched her every day for an entire summer and, on multiple instances, she specifically remembered that he touched her with his penis. The jury was free to draw the likely inference that his substantial sexual abuse of M., consistent with the abuse of S. and D., was ongoing. M. verified that he molested her all year. Moreover, the jury could, in following the jury instruction that included touching the genitals as substantial sexual conduct, conclude that defendant's aberrant behavior continued for over three months. Simply put, defendant would have us require a specificity from young victims not required by statute and

certainly not appropriate as a standard of review on appeal. A rational trier of fact, based on all the evidence presented at trial, could conclude that defendant engaged in substantial sexual conduct with M. for more than three months. (*People v. Vasquez* (1996) 51 Cal.App.4th 1277, 1287.)

III

INSTRUCTIONAL ERROR

A. Masturbation

Defendant complains that the trial court misinformed the jury that substantial sexual conduct could include masturbation involving only a slight touching of the genitals. Defendant contends that masturbation, by definition, must include the intent to stimulate and an act of genital stimulation. Case law does not support his argument.

In *People v. Chambless* (1999) 74 Cal.App.4th 773 (*Chambless*), a jury found the defendant was a sexually violent predator. On appeal, the parties asked the court to define masturbation for purposes of showing substantial sexual conduct under the Sexually Violent Predators Act (the Act) (Welf. & Inst. Code, § 6600 et seq.). Subdivision (b) of Welfare and Institutions Code section 6600.1 specifically provides that "'[s]ubstantial sexual conduct' means penetration of the vagina or rectum of either the victim or the offender by the penis of the other or by any foreign object, oral copulation, or *masturbation of either the victim or the offender*." (Italics added.) This definition is the same, in pertinent part, as the

definition of substantial sexual conduct described in Penal Code section 288.5.

The People argued in *Chambless* that any contact between the hand of one person and the sexual organ of another constitutes masturbation and thus qualifies as substantial sexual conduct for purposes of the Act. The Court of Appeal agreed, relying on the commonly understood meaning of the term, legislative intent, and analogous case law. As to the definition of masturbation, the court wrote that "such word appears to have been used simply in its commonly understood meaning to describe the touching of one's own or another's private parts without quantitative requirement for purposes of defining conduct that was lewd or sexually motivated." (*Chambless*, *supra*, 74 Cal.App.4th at p. 784.)

Chambless pled guilty to a violation of section 288, subdivision (a), a statute enacted to provide children with special protection from sexual exploitation. (*People v. Martinez* (1995) 11 Cal.4th 434, 443.) In 1996 the Legislature amended the Act to include the specific nonviolent act of masturbation as substantial sexual conduct. (*Chambless*, *supra*, 74 Cal.App.4th at p. 785.) The *Chambless* court presumed the Legislature "was aware of the general use of that term to describe any act of genital touching." (*Ibid.*) Such a construction, according to the court, comports with the Legislature's intent to provide additional protection for children. (*Id.* at p. 787.) It was also consistent with the law involving oral copulation. (*Id.* at p. 786.)

In *People v. Grim* (1992) 9 Cal.App.4th 1240, 1242 (*Grim*), the court upheld the validity of a jury instruction explaining that "'[a]ny contact, however slight, between the mouth of one person and the sexual organ of another person constitutes "oral copulation"'" and that penetration of the mouth was not required. Based on this finding, the *Chambless* court concluded: "Similarly, because [Welfare and Institutions Code] section 6600.1, subdivision (b) provides that masturbation as well as oral copulation can mean substantial sexual conduct, by parity of reasoning we believe the Legislature intended the extent of touching of the genitals required to meet the definition of masturbation would also be the same as in *Grim*. Hence, any contact, however slight of the sexual organ of the victim or the offender would be sufficient to qualify as masturbation and in turn as substantial sexual conduct under the Act." (*Chambless*, *supra*, 74 Cal.App.4th at pp. 786-787.)

Defendant insists that *Chambless* is inapposite because the Act is not before us. He claims that *People v. Lamb* (1999) 76 Cal.App.4th 664 (*Lamb*) sets forth the applicable definition of masturbation. We disagree. Although the Act is not at issue in the case before us, the court's in-depth analysis of the definition of masturbation is certainly analogous to whether a slight touching of the victims' genitals constitutes substantial sexual conduct under section 288.5. *Lamb*, on the other hand, focused on the meaning of the word "mutual" as used in the extended statute of limitations provided by section 803(g), not on the term "masturbation."

As we discussed at some length above, section 803(g) allows the People the opportunity to prosecute child molestation cases after the statute of limitations normally would have expired. The charge must involve substantial sexual conduct, *excluding masturbation that is not mutual*, to qualify for the extended statute of limitations. At issue in *Lamb* was the meaning of the phrase "excluding masturbation that is not mutual." The court rejected the defendant's notion that mutual meant reciprocal. Rather, the court concluded that the Legislature intended to exclude the extended statute of limitations to an offender who merely masturbated in the presence of another.

Defendant tries to enlarge the meaning of masturbation by extracting a mere phrase from the opinion. He insists that masturbation must include the "stimulation of another's genitals" and that mere touching is not enough. The *Lamb* court, however, did not consider the quantum of touching. It dealt exclusively with the issue before it, that is, the meaning of mutual masturbation. The context in which defendant's purported definition was extracted reads: "However, and as the People point out, 'masturbation' may refer either to the stimulation of one's own genitals or to the stimulation of another's genitals. [Citation.] Since masturbation may involve one participant or two, the People contend that the phrase 'masturbation that is not mutual' refers to masturbation involving one person, i.e., self-masturbation." (*Lamb*, *supra*, 76 Cal.App.4th at p. 680.)

In this case, the standardized jury instruction describing the elements of section 288.5 was modified to make it consistent

with the elements of section 803(g). The court deleted any mention of lewd or lascivious conduct and defined substantial sexual conduct as follows: "'Substantial sexual conduct' means penetration, however slight, of the vagina or rectum of the victim by the penis or finger of the defendant, oral copulation or mutual masturbation. The term 'mutual masturbation' includes the defendant touching the genitals of the victim, however slight." Defendant did not object to the modification.

We see no evidence in either the Act or section 288.5 that the Legislature intended to employ different meanings of masturbation. Both statutes require substantial sexual conduct. Both statutes were designed to protect children from exploitative sexual abuse. We therefore accept the *Chambless* court's definition of masturbation as encompassing any touching of the genitals, however slight. The court properly instructed the jury by including this definition.

B. Recurring Access

Defendant also asserts that the trial court erred by failing to define the phrase "recurring access" for the jurors despite his own failure to request clarification. The court instructed the jury pursuant to CALJIC No. 10.42.6 as follows: "Every person who either resides in the same home with a minor child or has recurring access to a child who over a period of time of not less than three months in duration engages in three or more acts of substantial sexual conduct with a child under the age of 14 years at the time of the commission of the offense is guilty of the crime of continuous sexual abuse of a child, a

violation of Penal Code section 288.5 . . . ." In *People v. Rodriguez* (2002) 28 Cal.4th 543 (*Rodriguez*), the Supreme Court held that the phrase "recurring access" had a commonly understood meaning that requires no sua sponte definition or clarification. There was, therefore, no instructional error.

In his reply brief, defendant "adheres to the dissenting opinion of Justice Moreno" in *Rodriguez* so as to preserve his federal constitutional claim. Justice Moreno concluded that the failure to define "recurring access" omits an essential element of the offense and, as a result, should be assessed under the federal constitutional test for harmless error. (*Rodriguez*, *supra*, 28 Cal.4th at pp. 551-556 (conc. & dis. opn. of Moreno, J.).) Since, according to the *Rodriguez* majority, there is no error, the federal test of harmlessness is irrelevant. Defendant does not articulate any other federal constitutional claim.

C. A *Grant* Unanimity Instruction

Section 288.5 became effective on January 1, 1990. In order to avoid collision with the constitutional proscription against ex post facto laws, the prosecution must prove that at least one of the acts of substantial sexual conduct occurred after the effective date of the statute. Defendant asserts the trial court committed reversible error by failing to instruct sua sponte that the jurors must unanimously agree at least one act occurred after January 1, 1990. We conclude that if there was error in failing to give a unanimity instruction related to

the effective date of the statute, it was harmless beyond a reasonable doubt.

In *People v. Grant* (1999) 20 Cal.4th 150 (*Grant*), the trial court instructed the jury as follows: "'The People have introduced evidence for the purpose of showing that there are more than three acts of substantial sexual conduct upon which a conviction in Count One may be based. Defendant may be found guilty [of violating section 288.5] if the proof shows beyond a reasonable doubt and you unanimously agree that the defendant committed three such acts. It is not necessary that you unanimously concur on which acts constitute the required number. However you must unanimously find that at least one such act occurred between January 1, 1990 [the effective date of section 288.5] and April 4, 1990 [Leah's 14th birthday].'" (*Grant*, *supra*, 20 Cal.4th at pp. 153-154.) The trial court here did instruct the jury, in the language of CALJIC No. 4.71.5, that "in order to find the defendant guilty, you must unanimously agree upon the commission of the same specific acts constituting the crime within the period alleged." Defendant, however, argues that the trial court's failure to deliver a *Grant* instruction constitutes reversible error. We disagree.

For the purpose of resolving the appeal before us, we accept, without deciding, two premises urged by defendant: first, that a unanimity instruction, even in this limited context, involves a general principle of law closely and openly connected to the facts before the court and necessary to the jury's understanding of the case so as to trigger the court's

sua sponte obligation to instruct (*People v. Cummings* (1993) 4 Cal.4th 1233, 1311), and second, the People must prove that the failure to give the instruction was harmless beyond a reasonable doubt (*Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705]).

This case, like many child molestation cases, involves a straightforward credibility contest between the child witnesses and defendant. Examples abound. In *People v. Matute* (2002) 103 Cal.App.4th 1437 (*Matute*), the court summarized the evidence as follows: "In sum, J.M.'s testimony reflected the ongoing, repetitive nature of the rapes which had blurred together in her mind, except for specific occasions such as her birthday, the week after her abortion, the time in October 2000 when he was particularly violent, and the day when she was examined for evidence of rape and appellant's sperm was found inside her body. Appellant's only defense was to deny that he ever had sexual intercourse with his daughter. Based on the evidence presented and the guidance given by the court's instructions and the prosecutor's comments, we are convinced beyond a reasonable doubt the jury unanimously agreed that the charged crimes took place in the number and manner described even without the submission of CALJIC No. 4.71.5." (*Matute*, *supra*, 103 Cal.App.4th at p. 1450.)

Similarly, in *People v. Smith* (2002) 98 Cal.App.4th 1182 (*Smith*), the court recounted: "Here, the trial evidence allowed for only two possible conclusions, namely, that all the section 288 molestations identified by Victim had occurred or

none had occurred. . . . After reviewing the available record, we conclude that it contains overwhelming evidence that defendant *committed* all of the hundreds of acts described by Victim with the requisite intent, including the multitude of described acts which occurred regularly between October 26, 1992, and April 20, 1996." (*Smith*, *supra*, 98 Cal.App.4th at pp. 1189-1190.)

In *People v. Brown* (1996) 42 Cal.App.4th 1493 (*Brown*), the court identified the dispositive issue in this way: "The important question is whether there was anything in the record by way of evidence or argument to support discriminating between the two incidents such that the jury could find that appellant committed one molestation but not the other. [Citation.] There was not. To state it slightly differently, in order for the unanimity instruction to make a difference, there must be evidence from which jurors could *both accept and reject* the occurrence of at least the same number of acts as there are charged crimes. [Citation.] There was not. Failure to deliver a unanimity instruction was harmless beyond a reasonable doubt." (*Id.* at p. 1502.)

Defendant denied each and every allegation of sexual misconduct with his nieces. At trial, he did not attempt to defend against some, but not all, of the charges. On appeal, however, he proffers a new possibility. He now contends there was some evidence to suggest that he moved away from the dairy just at the time section 288.5 became effective. Thus, according to defendant, the jury could have accepted the

witnesses' testimony that they were molested before January 1, 1990, and rejected their testimony that the sexual abuse continued thereafter. The record belies his belated defense.

M. testified that defendant molested her for the first time when she was five years old. She did not turn five until June 4, 1990, five months after the statute became effective. There was no evidence defendant molested M. before she was five. The purported error in failing to give a *Grant* instruction has no applicability to the charges involving M.

Both S. and D. testified to specified incidents of sexual abuse after January 1, 1990. D. testified that on the night before her confirmation, when she was 11, defendant stuck his finger in her vagina and licked her while she pretended to sleep. D. turned 11 on July 30, 1991. Similarly, S. testified that defendant molested her as she was watching the Rodney King riots on television when she was 11. She turned 11 on July 20, 1991. Both D. and S. testified to many acts of molestation after they were 10 years old.

We conclude there is no reasonable possibility the jury believed the girls' testimony that they had been molested before January 1, 1990, and disbelieved their specific recollection of incidents that occurred when they were older. While defendant might have moved off the dairy, he had continuing access to the girls, who spent the night at his house and swam in his parents' pool. Hence, we reject defendant's preposterous notion that he had a plausible defense to the charges antedating the effective date of the statute. He presented an all-or-nothing defense at

trial and nothing the court would have stated in the *Grant* instruction would have changed the jury's verdict.

D. Prior Uncharged Offenses

Defendant raises a multitude of challenges to the jury instructions regarding evidence of prior uncharged offenses. The prior sexual misconduct involved E., another of Aunt H.'s nieces, who was the same age as S. and D. E. also lived at the dairy. Like her cousins, E. testified that defendant grabbed her buttocks whenever Aunt H. left the room and grabbed her between her legs whenever he caught her coming down the slide into the pool. She told the investigator defendant contacted her "vaginal area" with his hands. Unlike her cousins, however, E. did not specifically testify that defendant put his hand inside her bathing suit and directly touched her genitals. According to defendant, therefore, E. described nothing more than playful "butt" and "between the legs" grabbing, an insufficient basis upon which to instruct the jurors they could infer that he was likely to commit the charged offenses if they found he had a disposition to commit sexual offenses.

Evidence Code section 1108 allows the prosecution to introduce evidence in a sex offense case of the defendant's other sex crimes for the purpose of showing a propensity to commit such crimes. Because such propensity evidence historically was inadmissible, section 1108 triggered an avalanche of litigation. Admission of propensity evidence to commit sexual offenses remains a landmine, although section 1108 has withstood due process challenges similar to the claims

raised by defendant here. (*People v. Falsetta* (1999) 21 Cal.4th 903, 916-918; *People v. Fitch* (1997) 55 Cal.App.4th 172, 181-182 (*Fitch*).)

Defendant asserts many of the lingering challenges involving the application of Evidence Code section 1108. He claims the revised jury instruction set forth at CALJIC No. 2.50.01 is unconstitutional. The Supreme Court recently rejected a similar challenge in *People v. Reliford* (2003) 29 Cal.4th 1007. He also contends there was insufficient evidence to justify the instruction. Moreover, according to defendant, even if the evidence is considered sufficient, the trial court erred by failing to identify which sexual offense under California law he purportedly committed against E.

We reject defendant's notion that grabbing a nine-, 10-, or 11-year-old girl's "butt" or grabbing her "between the legs" constitutes innocent horseplay. Nevertheless, we concede that the conduct E. described was less egregious than the overt sexual misconduct her cousins described in sordid detail. E.'s testimony merely corroborated their testimony that defendant engaged in persistent sexual misconduct in the pool. But it was S.'s, D.'s, and M.'s graphic testimony regarding specific incidents of sexual exploitation upon which the jury must have based its verdicts. We find it patently unreasonable to conclude that the jury would have ignored, minimized, or disregarded their compelling testimony and convicted defendant based on E.'s rather vague account of defendant's pathetic groping of a little girl. Whereas in many cases in which the

trial devolves into a credibility contest between the defendant and his victim evidence that the defendant has committed sexual offenses in the past tips the scales in favor of the victim, in this case E.'s testimony likely had little effect. In contrast to the short description provided by E., her cousins testified at great length to a pattern of graphic sexual abuse over many years. Hence, in context, E.'s so-called propensity evidence appeared unfortunately benign and hardly prejudicial. If indeed there was any error, it was harmless beyond a reasonable doubt.

IV

EX POST FACTO LAW

Defendant committed his offenses before January 1, 1996, the date Evidence Code section 1108 became effective. In *Fitch*, *supra*, 55 Cal.App.4th at pp. 185-186, we held that application of section 1108 in a trial involving crimes committed before the statute became effective did not violate the constitutional prohibition against ex post facto laws. Defendant urges us to reconsider *Fitch* in light of the United States Supreme Court's clarification of ex post facto jurisprudence in *Carmell v. Texas* (2000) 529 U.S. 513 [146 L.Ed.2d 577] (*Carmell*). We conclude that *Carmell* does not compel us to reject our holding in *Fitch.*

The hallmark case in ex post facto jurisprudence was decided in 1798. In *Calder v. Bull* (1798) 3 U.S. (3 Dall.) 386, 390 [1 L.Ed. 648, 651] (*Calder*), Justice Chase articulated a four-part analysis of the ex post facto clause in the federal Constitution. He identified the following scenarios, each of which offends a fundamental sense of fairness: "1st. Every law

that makes an action, done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action. 2nd. Every law that *aggravates a crime*, or makes it *greater* than it was, when committed. 3rd. Every law that *changes the punishment*, and inflicts a *greater punishment*, than the law annexed to the crime, when committed. 4th. Every law that alters the *legal* rules of *evidence*, and receives less, or different, testimony, than the law required at the time of the commission of the offence, *in order to convict the offender*."

Over time, federal courts devised shorthand formulations for Justice Chase's four-part description. In the more succinct formulation, laws violate the ex post facto clause if they redefine the criminal nature of an act or increase the punishment for a criminal act. (See *Collins v. Youngblood* (1990) 497 U.S. 37, 43 [111 L.Ed.2d 30, 39]; *Beazell v. Ohio* (1925) 269 U.S. 167, 169-170 [70 L.Ed. 216, 217-218.) In *Carmell*, *supra*, 529 U.S. 513, however, the Supreme Court resurrected the dormant fourth category articulated in *Calder*. Defendant insists that retroactive application of Evidence Code section 1108 falls within the proscribed fourth category. He overstates the scope of the revitalized fourth category.

In *Carmell*, a Texas statute that required both the victim's testimony and corroborating evidence to convict an offender of sexual assault was amended to allow a conviction based on the victim's testimony alone. (*Carmell*, *supra*, 521 U.S. at pp. 530-531.) The Supreme Court held that the amendment constituted a proscribed ex post facto law. The court explained: "A law

reducing the quantum of evidence required to convict an offender is as grossly unfair as, say, retrospectively eliminating an element of the offense, increasing the punishment for an existing offense, or lowering the burden of proof [citation]. In each of these instances, the government subverts the presumption of innocence by reducing the number of elements it must prove to overcome that presumption; by threatening such severe punishment so as to induce a plea to a lesser offense or a lower sentence; or by making it easier to meet the threshold for overcoming the presumption. Reducing the quantum of evidence necessary to meet the burden of proof is simply another way of achieving the same end." (*Id.* at pp. 532-533.)

Defendant argues that Evidence Code section 1108 relaxes the evidentiary hurdle for the prosecution by allowing admission of propensity evidence that, before section 1108 became effective, would have been excluded. The Supreme Court dispelled such an argument, stating: "We do not mean to say that every rule that has an effect on whether a defendant can be convicted implicates the *Ex Post Facto* Clause. Ordinary rules of evidence, for example, do not violate the Clause. . . . [S]uch rules, by simply permitting evidence to be admitted at trial, do not at all subvert the presumption of innocence, because they do not concern whether the admissible evidence is sufficient to overcome the presumption." (*Carmell*, *supra*, 521 U.S. at p. 533, fn. 23.) The court amplified on the distinction between rules of admissibility and the quantum of evidence necessary to convict the defendant as follows: "The

issue of the admissibility of evidence is simply different from the question whether the properly admitted evidence is sufficient to convict the defendant. Evidence admissibility rules do not go to the general issue of guilt, nor to whether a conviction, as a matter of law, may be sustained. Prosecutors may satisfy all the requirements of any number of witness competency rules, but this says absolutely nothing about whether they have introduced a quantum of evidence sufficient to convict the offender." (*Id.* at pp. 546-547.)

For the same reason, we conclude that Evidence Code section 1108 does not affect the quantum of proof necessary to convict a defendant of sexual misconduct. More akin to witness competency rules, section 1108 allows the prosecution to examine the defendant's prior victims and thereby demonstrate his propensity to commit sex crimes. But it does not lighten the prosecution's burden of proof, change the elements of the offense, or reduce the sufficiency of the evidence necessary to convict the defendant. In sum, section 1108 expands the admissibility of some types of evidence, but it does not reduce the quantum of proof. Hence, the logic of *Carmell* does not apply. As we concluded in *Fitch*, *supra*, 55 Cal.App.4th at pp. 185-186, retroactive application of section 1108 does not violate the constitutional ban on ex post facto laws.

V

INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant urges us to reverse the trial court's denial of his motion for a new trial because his court appointed lawyer

erroneously informed him during plea negotiations that his maximum exposure was 24 years when, in fact, he faced a maximum term of 48 years. He testified at the hearing on the motion for a new trial that he would have accepted the prosecution's offer of 16 years had he known he might be sentenced to prison for 48 years. No one disputes that defense counsel's miscalculation constituted ineffective assistance of counsel. The issue presented is whether defendant sustained his burden of proving there is a reasonable probability he would have accepted the negotiated plea had he not been misadvised about the possible length of his sentence.

We undertake a de novo review of the record to determine whether defendant has established by a preponderance of substantial, credible evidence that he was prejudiced by his counsel's mistake. (*In re Alvernaz* (1992) 2 Cal.4th 924, 944-945.) Defendant bears the burden of proving a reasonable probability that, had he been accurately informed his maximum sentence was 48 years, he would have accepted the negotiated plea. (*Id.* at p. 945.) His self-serving statement that he would have accepted the offer if given competent advice must be corroborated by independent, objective evidence. (*In re Resendiz* (2001) 25 Cal.4th 230, 253.)

Defendant maintained his innocence before, during, and after trial. He believed his ex-wife had conspired with the four witnesses, and before trial, he remained optimistic that he would be exonerated. He realized that, as a child molester, he might be stabbed or possibly killed in prison. He testified he

was unwilling to enter a plea to the child molestation charges in front of his wife, his children, and his parents.

His lawyer informed him that the prosecution had offered a term of 16 years in state prison for a plea of guilty to two counts of section 288, subdivision (a), nonforcible lewd conduct with a child. Having been told that his maximum exposure was 24 years, he declined the offer. He did not consider making a counteroffer. At all times, he believed he had an excellent chance of winning at trial. Nevertheless, after the jury returned three guilty verdicts and he learned he might spend 48 years in state prison, he insisted he would have accepted the negotiated plea had he only known the true length of his maximum sentence.

His lawyer also declared that had she understood the statute and properly calculated defendant's maximum sentence, she would have advised him to accept the offer, and she was confident he would have followed her advice. She testified that defendant was very optimistic about his chance of prevailing at trial. Although she felt the evidence in support of one of the counts was somewhat weak, she realized the gravity of the charges and the difficulty of prevailing when multiple child victims testified at trial.

The trial court, having presided during trial, concluded that defendant had not sustained his burden of proving prejudice. The court explained: "My view is based on the particulars of this case and your unflinching stance of your own personal innocence and the belief that you would be exonerated

at trial, even your testimony here before the Court that prior to the outset of trial you were not going to be in a position to stand up and enter a plea, a plea of no contest acknowledging or accepting some responsibility for these charges, I understand there was some retraction of that particular position, but, Mr. Wardlaw, under all the circumstances, I feel that you have not persuaded me that there was a reasonable probability that had you been properly advised, which I'm finding you were not, that you would have accepted the disposition the [P]eople offered at that time."

The issue on appeal is a difficult one requiring us to divine the likelihood of what the defendant *might* have done had he been properly informed. Certainly the disparity in the maximum sentence he thought he faced and the maximum sentence he actually faced is some evidence that he would have accepted the prosecution's offer. Since he was 46 years old at the time he was sentenced, he would be forced to spend the greatest part of his remaining life in prison. The 16-year term appears much more attractive when measured against a possible 48 years rather than the 24 years he believed he faced.

Nevertheless, we must ascertain whether there is a reasonable probability he would have accepted the offer based not only on his self-serving, postverdict statement, but also on independent, corroborative evidence. Having considered the entire record, we must agree with the trial court's conclusion that defendant did not sustain his burden of proof. Surely his mortified lawyer's testimony substantiated his claim to some

extent, but her ultimate conclusion that he would have accepted her advice and entered the plea is pure speculation. That leaves us in the untenable position of assessing the likelihood that he would have remained true to his desire to win at trial, to expose his ex-wife's conspiracy, and to retain the respect of his wife and children or serve 16 years in state prison, although innocent, to avoid the possibility of a much longer sentence.

The jury concluded that defendant's protestations of innocence were a lie. According to the jury verdicts, defendant's testimony must have been a fraud. His self-serving testimony at the motion for a new trial, therefore, can be disregarded as incredible. Moreover, one minute he told the prosecutor "fuck you," and a few minutes later, he pled with the court to have mercy on him. Having carefully considered the entire record in this case, we conclude there is no reasonable probability he would have entered the plea and accepted 16 years in state prison. There is simply no evidence that he attempted to negotiate with the prosecution, that he believed he might lose the case, or that he was willing to accept any kind of offer. He was and remains adamant about his innocence, and given the posture he has assumed in front of his family, we do not think it was reasonably probable he would have agreed to serve 16 years in state prison without attempting to prove his innocence at trial.

VI

SENTENCING

We accept the Attorney General's concession that defendant is entitled to one additional day of actual presentence credit due to an arithmetic mistake and to full conduct credits pursuant to section 4019, and that the parole revocation fine must be stricken. (*People v. Callejas* (2000) 85 Cal.App.4th 667, 678.) We remand the case to the trial court to determine if defendant is entitled to any custody credits for time he served in Idaho and, if so, for how many days. (*In re Antwon R.* (2001) 87 Cal.App.4th 348, 353.)

In all other respects, the judgment is affirmed.

RAYE, J.

We concur:

SCOTLAND, P.J.

ROBIE, J.